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Lecture

Seven Deadly Sins of Straining the Constitution Through a Pseudo- Scientific Sieve

By LAURENCE H. TRIBE*

Judge Peckham, Chief Justice Bird, distinguished members of the Supreme Court of California, Mrs. Tobriner, Dean Prunty, ladies and gentlemen: To say that I am honored and grateful to be here this afternoon, delivering the second annual Tobriner Memorial Lecture,¹ would be a wild understatement. I'm more than honored: I'm humbled, and I'm overwhelmed.

I remember so well how I felt in the first days of my clerkship with Justice Tobriner, just a bit more than eighteen years ago today. In a way it feels like yesterday, even though so much has changed. Neither my daughter Kerry nor my son Mark had yet been born—although Mark, who will be eighteen soon, was on his way. The world itself has changed, too. In those days, Ronald Reagan was running for his first public office, the governorship of California. Earl Warren had completed fewer years as Chief Justice than Warren Burger has now served in his tenure as Chief. Sandra Day O'Connor was Assistant Attorney General of Arizona. William H. Rehnquist was a partner in a Phoenix law firm.

As I say, much has changed. But much abides. The spirit that was Mat Tobriner's is still with us, stilled in part by his absence, but soaring in the memories and in the work that all who learned from him, and loved him, try to carry on.

If anyone had told me, in those first days of my genuinely inspiring

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1. I am grateful to the Tobriner Committee and Hastings College of the Law for inviting me to deliver this address in San Francisco on October 18, 1984. Rather than turning what was a largely extemporaneous lecture into a full-dress article, I have decided, on the advice of many of those who were there, to preserve the flavor of the occasion by reproducing an essentially unadorned version of the transcript of my remarks as the Second Tobriner Memorial Lecturer.

clerkship with the judge, that I would be standing here today, delivering the second annual lecture in his memory, following Judge Skelly Wright to this distinguished podium, I would have said, "You're crazy." And if I could have peered into the future, seen myself here today, with the judge no longer here, I would have felt a deep sadness—and then fallen speechless.

It was Tennyson who wrote "I am a part of all that I have met."² For having met Mathew Tobriner, whose thoughts and hopes became a part of me, I will always be grateful. Among Mat's most enduring lessons was one that recalls Tennyson: All of us become a part of the world we choose. We do not just inherit society, we help create it. The choices that we make as lawyers, as people, do much more than serve some mix of already existing "interests" and "values." Our choices shape what our interests and values *are* by *constituting* who and what we ourselves *become*. To construe and build the law, especially constitutional law, is to choose the kinds of people, the kind of society, that we will be.

For Justice Tobriner it was vital that those choices be animated, above all, by human concern and humane compassion. It was Mat's concern that all legal decisions advance human dignity, even when that means judges balking at bureaucratic imperatives, defying the demands of efficiency and casting aside the claims of exalted authority.

My lecture today will explore a very different vision of what courts should do—a vision of court as calculator, which seeks less the vindication of justice than the budgeting of rights. It is a vision that seeks less "equal justice under law" than "efficient policy through bureaucratic rule." It is a managerial vision of deference to authority and expertise, couched in the technocratic garb of "cost-benefit analysis," and reinforced by the illusory precision and the pretended neutrality of a pseudo-scientific calculus for measuring claims and counterclaims.

I hope to show, in as much detail as our very limited time together will permit, how this technocratic vision is coming to dominance in the Burger Court, what it means for human rights and for the judicial mission, and why I believe with all my being that it should be criticized and combatted as a profound perversion, even if an unintended one, of the perspective from which any genuine constitutional court ought to view and help to shape the political and social world. My plan is to do that by describing what I regard as the seven characteristic facets—for some they may be virtues; as you will soon see, for me they are decidedly vices—of the technocratic mode that I see the current Supreme Court deploying. I

2. Tennyson, *Ulysses*, in THE NORTON ANTHOLOGY OF POETRY 402 (Shorter ed.1983).

think of them, only slightly tongue-in-cheek, as the "Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve."

Let me turn to sin number one—the sin of devaluing process, of ignoring the independent value of respecting personal dignity and security in the means that government uses to achieve its ends.

One of my favorite stories comes from the Midrash. It is said that, before God expelled Adam from the Garden of Eden for eating of the Tree of Life, He gave Adam a moment to regain his composure and asked him why he had taken a bite. You might wonder about the reason for God's inquiry. Surely it was not to reduce the risk of divine error—to minimize the costs of an inefficient adversarial process. It was a matter of process for its own sake, rather like the code of Wild Bill Hickock: never shoot a man until you've looked him in the eye. That is, God's inquiry was an affirmation of the dignity even of those who had strayed. That's rather hard to capture in a cost-benefit analysis, and for years now the United States Supreme Court has been talking about values like those of procedural fairness as though they were simply tools, instruments, means to the end of maximizing the size of the total pie for society rather than things substantively valued in themselves. As I say, it's been going on for years, but the trend has accelerated and has taken on a sinister intensity.

The values of process are hardest to weigh in a calculus of costs and benefits. I think the most telling illustrations of the difficulty come from the Court's now well-known decisions of the past Term with respect to illegal search and seizure and illegal interrogation. I have in mind, of course, the cases of *United States v. Leon*,³ a fourth amendment case, and *New York v. Quarles*,⁴ a case arising under the fifth amendment. In *Leon*, the Court in essence held that the costs of more lost convictions outweigh the benefits of incremental deterrence when police make a reasonable mistake based on an invalid search warrant.⁵ Now, in that kind of calculus, the costs will always seem weightier than the benefits. The benefits will be elusive, intangible, diffuse. Costs will be visible and concrete: "There he goes, getting away, someone who committed a crime!" Of course, what that calculus doesn't even begin to account for is the sense in which the judiciary itself, whenever it admits illegally obtained evidence, abridges the "security" from "unreasonable searches and seizures" that the fourth amendment, I had thought, promised us all.

3. 104 S. Ct. 3405 (1984). The companion case was *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984).

4. 104 S. Ct. 2626 (1984).

5. 104 S. Ct. at 3421.

That calculus fails to take into account the story that is told of official lawlessness when judges themselves become accomplices in illegality. But such blindness is the natural consequence of a cost-benefit approach to these matters.

Or consider the fifth amendment decision, *New York v. Quarles*, a case which holds that, when the public safety makes it "reasonable" to interrogate without giving warnings, then the costs of excluding the resulting confession exceed the benefits, despite the violation of *Miranda*.⁶ I'm happy to say that even Justice O'Connor dissented from that conclusion.⁷ The Court didn't account for the violation of the defendant's rights against compelled self-incrimination by the lower court's use of a coercively obtained confession, even if public safety made it entirely understandable and reasonable for the police to *do* exactly what they did.

The general danger illustrated by both of these decisions is a danger well put by Justice Brennan in his dissent in *Leon*.⁸ He speaks there of the "narcotic effect," the "illusion of technical precision and ineluctability," which comes when we allow ourselves to talk like little scientists about the costs and benefits of these various rules.⁹ It is well put by Justice Marshall in his dissent in the *Quarles* case when he speaks of the "pseudo-scientific precision" of cost-benefit rhetoric in this realm.¹⁰

But there is another, and in some ways more substantive, danger: that focusing exclusively on the marginal costs and benefits of enforcing these rules ignores concerns for equality that underlay the Warren Court's movement in this direction in the first instance. The entire criminal procedure revolution was born not of some perverse desire to make the task of the police more difficult. The notion that we should warn suspects of their rights was born of the idea that, if the rich know of their rights already, the poor at least ought to be told. It was Mat Tobriner who prefigured that development in his landmark decision in *People v. Dorado*,¹¹ a decision that helped pave the path for *Miranda v. Arizona*.¹² But it's hard to weigh the costs and benefits of equality. Equal justice doesn't fit easily into any such calculus.

And that leads me to the second sin of which I think the current Court is guilty: the sin of ignoring distributive concerns, the way in

6. 104 S. Ct. at 2632 (*Miranda v. Arizona* is found at 384 U.S. 436 (1966)).

7. 104 S. Ct. at 2634 (O'Connor, J., concurring in part and dissenting in part).

8. 104 S. Ct. at 3430 (Brennan, J., joined by Marshall, J., dissenting).

9. *Id.*

10. 104 S. Ct. at 2645 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

11. 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (Tobriner, J.).

12. 384 U.S. 436 (1966).

which alternative rules affect the relative power of rich and poor in our society. I'm sure a number of you are familiar with the law and economics literature centered at the University of Chicago. It is revealing in many respects—among them, in the respect that it treats the distribution of income and wealth in society as a *given*, as though it were some kind of geological circumstance. That mode of inquiry asks only, "How can we maximize total utility, given a particular distribution of wealth and power?" In that world view, the inability to pay is a meaningless concept; those who don't buy something simply haven't decided to give up enough of everything else. And the Supreme Court is largely accepting that world view, even in cases involving freedom of speech—which earlier Courts had thought ought to be a freedom, above all others, available *not* only to those who can pay the price.

Two examples will have to suffice in this lecture, although many more might be put forth. The first will come from California, the case of *Members of City Council v. Taxpayers for Vincent*.¹³ In that case, the Los Angeles City Council imposed a ban on the posting of signs on public property, including campaign posters on telephone poles. It did so, the Court said, in order to reduce "visual clutter."¹⁴ The Supreme Court upheld the ban by a vote of six to three. Those who urged a different result objected that the obvious impact of this rule in Los Angeles was to silence the poor in a discriminatory way. Very few wealthy people need to stick posters on telephone poles; other means of more effective communication are available to them. The Court's reply? In essence, it was this: The rule is neutral on its face. And the legislature decided that its benefits outweighed its costs.¹⁵ The poor responded: Back in the late 1930's and early 1940's, the Supreme Court had held, after all, that leafletting on the streets and from door to door is protected because, for the poor, that is "one of the most accepted techniques of seeking popular support."¹⁶ Even a neutral ban on leafletting, the Court had held as early as 1939, is therefore unconstitutional.¹⁷ The current Court's terse reply? The special "solicitude" shown for the poor in those cases "has practical boundaries."¹⁸

Let me give you another example. The case is *Clark v. Community*

13. 104 S. Ct. 2118 (1984).

14. *Id.* at 2130.

15. *Id.* at 2135.

16. *See, e.g.,* *Martin v. Struthers*, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people.").

17. *Schneider v. New Jersey*, 308 U.S. 147 (1939).

18. *Vincent*, 104 S. Ct. at 2133 & n.30.

for *Creative Non-Violence*.¹⁹ In that case, by a vote of seven to two, the current Court upheld the Interior Department's ban on sleeping in Lafayette Park. People could lie down, but if they dozed off they violated the ban. And that was true even though they were there not for the fun of it, or for shelter alone, but to demonstrate the plight of homelessness. I know that Mat Tobriner would have seen the message of the derelicts there along with the ordered beauty of Lafayette Park. Chief Justice Bird reminded us of that.²⁰ But not the current Court. Government officials, that Court in effect said, have struck a reasonable balance between order and plight, and we should defer to that balance.²¹ Justice Marshall dissented.²² He said that his brethren and sister of the majority had ignored how bureaucrats tend to overregulate the powerless, adding that the Court has become remarkably insensitive to the plight of the poor.²³ In effect, the Court held in *CCNV* that the Department of the Interior may forbid rich and poor alike to sleep in the parks of Washington, D.C., in an echo of the majestic equality of French law that Anatole France described so well so long ago.

But actually, this Term's Anatole France Award goes not to *Clark v. Community for Creative Non-Violence* but to a case called *Selective Service System v. Minnesota Public Interest Research Group*.²⁴ The holding of that case was not particularly remarkable in itself. Indeed, I think I might be prepared to defend the outcome. In that case the Court held that it was permissible to withhold federal financial aid from students who did not certify that they had complied with their Selective Service

19. 104 S. Ct. 3065 (1984).

20. See Bird, *Justice Mathew O. Tobriner—The Heart of a Lion, The Soul of a Dove*, 70 CALIF. L. REV. 871 (1982):

He had a clarity of vision that was, indeed, rare. From his office window he viewed a nearby park and in it he saw a pattern of the life around us. His words reflect his artist's eye[:] "[I]t was a Monday morning, and, as is the custom of that plaza, dozens of weekend drunks were lying in various deathlike poses on the grass and across the benches. The presence of these derelicts of an industrial age demonstrated that life itself intrudes on the precise plan. No perfect order and no scheme of law, however wise, can escape the impact of the imperfect human being. We shall always be engaged in reconciling the fixed system with the ever-present surges, demands and travail of a struggling humanity. And in that legal process of reconciliation there will always be those who see the beauty of the design and those who see the pathos of the drunks." Mathew Tobriner was unique because he had the capacity both to see the design and to feel the pathos.

Id. at 873-74.

21. *CCNV*, 104 S. Ct. at 3072.

22. *Id.* at 3073 (Marshall, J., joined by Brennan, J., dissenting).

23. *Id.* at 3079 n.14, 3080.

24. 104 S. Ct. 3348 (1984).

registration requirements.²⁵ But whatever you think of the result, let me ask you what you think of the Court's analysis when responding to the argument that this rule discriminates against the poor. The Court's answer was brief and was contained in a single footnote written by the Chief Justice: The policy treats all nonregistrants "alike," he said, "denying aid to both the poor and the wealthy."²⁶ It's true, but one wonders if it captures the essence of the objection.

The Court's current approach has a tendency to flatten issues, to squeeze the living complexity out of them, to extract the distributive dimension from them. Indeed, the cost-benefit mode of thought leads inexorably to a third sin: a fixation on the tangible, visible impacts of challenged governmental practices, to the exclusion of such relative intangibles as the comparative status or dignity of distinct groups in society. The tendency, of course, of *all* cost-benefit modes of analysis is to simplify, to reduce to a common denominator, to a single value that one then seeks to maximize. That, in turn, filters out textured aspects of a problem. As I described it in an earlier article about the abuse of "Trial By Mathematics,"²⁷ the tendency is to dwarf soft variables, and it's an even more pernicious tendency when it occurs in constitutional law than when it occurs in environmental law or elsewhere.²⁸

There are dramatic current examples of that tendency beyond even the criminal procedure and free speech cases. I have in mind two cases decided recently by the Supreme Court. One, *Lynch v. Donnelly*,²⁹ involved the official placement in Pawtucket, Rhode Island, at public expense and in a prominent place, of a nativity scene, a crèche, not paralleled by the holy scenes of any other religion. The other, *Marsh v. Chambers*,³⁰ involved official sponsorship of prayer by a minister—a chaplain addressing the state legislature—at the start of each legislative day.

The Court's approach in those cases was straightforward. It asked, essentially: Do these practices tangibly harm nonbelievers? Are there any real costs here? Do they harm believers of other faiths? The Court's

25. *Id.* at 3359.

26. *Id.* at 3359 n.17.

27. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

28. See also Tribe, *Policy Science: Analysis or Ideology*, 2 PHIL. & PUB. AFF. 66 (1972); Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973); Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

29. 104 S. Ct. 1355 (1984).

30. 103 S. Ct. 3330 (1983).

answers were predictable, given the questions: No, there is no concrete harm, no measurable cost. Nonbelievers are, after all, not *made* into outsiders by these practices. It's *their* problem if they feel that way.

Does that remind you, perhaps, of the Supreme Court's "separate but equal" phase in the days of *Plessy v. Ferguson*?³¹ There the Supreme Court had said, in essence: When we separate out the blacks, we don't mean to say they're inferior; it's their problem if they put that paranoid interpretation upon it. Justice O'Connor at least asked the right question in *Lynch*. She asked whether nonadherents are sent a message by these practices that they are "outsiders, not full members of the political community?"³² The problem, however—and the reason she essentially answered: No, there is no such message—is that she and the majority let the *insiders* define what message the outsiders were getting. To the insiders it didn't seem offensive at all.

There is a pervasive pattern here—and I have in mind the current debates about religion and politics, as well as what the Court has been doing. When the government dons a cloak of religious sanctity and points to its opponents to suggest they are unreligious, the cloak is least likely to be visible, much less objectionable, to those who wear the same colors.

Issues like this—worrying about what the relevant perspective is, about whether we should look at things from the perspective of the insider or the outsider—don't fit at all well into the bureaucratic, technocratic, managerial, cost-benefit mode. How do you put a number on it? How do you compare the costs and benefits of the insider and the outsider perspective? That, then, is the third sin: fixation on the tangible, the visible.

There is a fourth. I would call it inviting "the tyranny of small decisions," a lovely phrase coined some time ago by the economist Alfred Kahn.³³ He used the phrase to describe the fallacies of those economists and managers who tend to look down at their feet to figure out how far they've gone and where they're heading. It's not a very illuminating view. They may think they've taken but a short step from where they were just a moment ago; it's no surprise that, by the time they realize it, they've departed a remarkable distance from their first premises.

Well, it's one thing for bureaucrats and engineers and managers to be guilty of that sin—but for the institution which, above all, is supposedly committed to first principles to commit it poses, I think, a deeper

31. 163 U.S. 537 (1896).

32. 104 S. Ct. at 1366 (O'Connor, J., concurring).

33. A. Kahn, 19 KYKLOS: INT'L REV. OF SOC. SCI. 23 (Fasc. 1, 1966).

problem. The case of the Christmas crèche, *Lynch v. Donnelly*,³⁴ illustrated that problem. The Court there, having recently decided *Marsh v. Chambers*³⁵—the case that allowed ministers to be paid with tax money for giving prayers at the beginning of a legislative session—loaded its question (Are we really, concretely, harming the outsiders?) and asked only if this marginal further step did more harm than good. The Justices were looking at their feet and, I think, had little idea where they were walking.

By the way, the fact that these examples almost all come from the past Term should not lead you to believe that this has all happened overnight. It has been accumulating. But now, finally, I think a critical mass has almost been reached. And so I focus on this Term because it's most illustrative.

In *Regan v. Wald*,³⁶ the Cuba travel case, the Court dealt with something Congress had done several years ago. Congress had decided in 1977 to end a great deal of the President's vague, emergency authority, authority that the President had been invoking to regulate Americans abroad under the Trading with the Enemy Act of 1917.³⁷ A number of you may not know that large numbers of declared national emergencies, tracing to World War II and other crises, had never been undeclared. The President had all kinds of emergency powers, and after elaborate hearings Congress decided to cut most of them off as of 1977. Congress then created two tracks on which the President could thereafter proceed to regulate such things as the travel of Americans abroad by regulating their use of American currency. There was the "war" track and the "peace" track; the tracks could hardly be more distinct.³⁸ On the "war" track, the old, vague powers of the Trading with the Enemy Act remained. When we are in a state of war, the President has almost a blank check.³⁹ But on the "peace" track, said Congress, the President can exercise such powers only by declaring a state of national emergency and, to the degree possible, consulting with Congress.⁴⁰

But Congress made an exception. It exempted existing exercises of authority that were in place as of July 1, 1977⁴¹—the so-called "grandfa-

34. 104 S. Ct. 1355 (1984).

35. 103 S. Ct. 3330 (1983).

36. 104 S. Ct. 3026 (1984).

37. 50 U.S.C. app. §§ 1-44 (1982) (amended by Act of December 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625).

38. *Id.* § 5(b) ("war track"); *id.* §§ 1701-1706 ("peace track").

39. *Id.* § 5(b).

40. *Id.* §§ 1701(a), 1703.

41. *Id.* § 5 note.

ther clause." In *Wald*, the Supreme Court held, by a vote of five to four, that President Reagan's 1982 ban on tourism to Cuba fit within the grandfather clause.⁴² Now that was an interesting holding because, on July 1, 1977, there was no ban on travel to Cuba. And, to its credit, the Administration did concede that much.⁴³

But it had two theories about why the grandfather clause applied. Theory number one: when President Carter *lifted* the ban that had earlier existed on travel to Cuba, he was engaging in an "exercise of authority," and *that* "exercise" was in effect on July 1, 1977!⁴⁴

Doublethink for 1984.

If you don't like that theory, there was another: something for everyone. The second theory declared: Oh, yes, there *had* been a ban in effect on July 1, 1977. To be sure, it was not a ban on actual travel by people. It was a ban on trade in commodities like cigars,⁴⁵ but . . . cigars, people

It's a small step. It's all just a marginal adjustment. In effect, the Court held that Congress had really authorized the President to do what I think a fair reading of the legislative history shows that Congress in 1977 fully intended to prevent the President from doing. My colleague Paul Bator, then Deputy Solicitor General, in a public exchange of views with me on this subject,⁴⁶ said that the two tracks were just technically different. War and peace—technically different? Since Paul is not here today, it's not fair for me to go on further. But I think the two tracks could not have been more fundamentally different.

It's not hard to contrast this approach with that of the Warren Court in the late '50s—in a case called *Kent v. Dulles*.⁴⁷ The Court there took the view that the liberty of international travel was so fundamental to what it meant to be an American that this liberty could not be restricted by the executive without the *clearest* authorization by Congress.⁴⁸ Now ask yourself, in light of the debate here and the five to four division on the Court, was there the *clearest* authorization by Congress for what President Reagan did in 1982? Hardly. The Court's way of coming out differently arises in part from a deferential attitude toward the executive that is invited by a marginal cost-benefit approach. The

42. 104 S. Ct. at 3033-35.

43. *Id.* at 3032-33.

44. *Id.* at 3034.

45. *Id.*

46. *See Constitutional Law Conference*, 53 U.S.L.W. 2187, 2194 (Oct. 16, 1984).

47. 357 U.S. 116 (1958).

48. *Id.* at 129-30.

Court didn't ask fundamental questions about what kind of country this is when the President on his own authority can restrict international travel. It asked instead whether people really are all that different from cigars.

Now, of course, I do not suggest that the Justices of the Supreme Court of the United States don't recognize the difference. But these are decisions of the Court that are understandable only from a point of view that is systematically blinded to what the difference *means*. Consider, for example, the decisions about prisoners' rights, also from this Term. In *Hudson v. Palmer*,⁴⁹ the Court held that the fourth amendment protection against unreasonable searches and seizures has *no* application whatever to a prison cell, even if it's the cell of someone just awaiting trial. In *Block v. Rutherford*,⁵⁰ the Court held that prison authorities have absolute discretion, even when there is no demonstrable security problem, to prevent a prisoner from even touching his child during a visit. Justice Stevens, in an impassioned dissent, said that the majority had declared prisoners to be "little more than chattels."⁵¹ The reduction of people to objects, whether it's in the context of tourists and cigars or prisoners and chattels, is easy to slip into if one approaches things through the perspective of a cost-benefit manager and tries not to ask fundamental questions about what sort of society we are, and what sort of society we would like to become.

That leads to a fifth sin that I believe the current Court is committing—profoundly, frequently, and with devastating effect: the sin of overlooking the constitutive dimension of government action, including judicial action. That is, the Court is thinking of the actions challenged before it purely in terms of the effects they will have out there in the world in demonstrable ways, and not in terms of what they *say* about who and what we are as a people and how they help to constitute us as a nation.

Think again about the Christmas crèche case⁵² from that point of view. What does it say about the nation that it feels comfortable making people feel like outsiders and that it asks how they feel purely from the comfortable position of those within? What does it say about the country that we feel comfortable putting someone in prison as a result of an illegal search and seizure or an illegal interrogation?

You can't answer those questions by asking someone to compare the

49. 104 S. Ct. 3194 (1984).

50. 104 S. Ct. 3227 (1984).

51. *Hudson*, 104 S. Ct. at 3215 (Stevens, J., concurring in part and dissenting in part).

52. *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984); see *supra* text accompanying note 29.

costs and benefits of the alternatives. And there is a fundamental reason. The reason is that comparing costs and benefits presupposes a given schedule of how high or low various options should score on society's scale, from the awful to the fantastic. But constitutional decisions *alter that very scale*. They are like technologies that redesign human genetic material.⁵³ When constitutional decisions are made, those decisions make a statement to the country about what counts as a cost and what counts as a benefit, about what we regard as a good and what we regard as an evil.

To make that clearer, I think it would help to look more closely at the criminal procedure cases, because there is a profound fallacy in the Court's cost-benefit approach to search and seizure that has been overlooked in most of the commentary. So let me focus more closely upon those cases. I'll do that by comparing the situation before and after the Court's decision holding that, even though evidence was illegally seized, it may nonetheless be admitted if the illegality resulted from a "reasonable" mistake based upon an unlawful warrant.⁵⁴

The situation before that change, of course, was that the illegal search and seizure occurred and a defendant, quite visibly guilty, was set free. And the Court's reaction to that is, in substance: How awful. That's a terrible thing. That's a cost. Are the benefits worth it?

Now ask yourself what happens when the Court moves to, one might say, "de-awfulize" the situation. What's the situation when such evidence becomes admissible? There are only two possibilities. One possibility is that the illegal searches and seizures will continue to occur (because all of the hopeful predictions that we will find alternative ways to deter them will prove false), and that guilty defendants will be jailed as a direct and demonstrable result of violating the Constitution. We'll have more people in jail because the Constitution was violated. Now is that a net cost or a net benefit? It depends on what you think about the Constitution, I would suppose.

But there is another possibility, the one that proponents of cutting back the exclusionary rule stress. They claim that alternatives every bit as effective as this awful exclusionary rule will be found that will deter the illegal searches and seizures: the threat of suing the police officer, for example, or altering the educational methods by which the police are trained. Well, let's suppose they are right. Let's give them the benefit of the doubt. If they are right, then what happens? What happens is that

53. See generally Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973).

54. See *United States v. Leon*, 104 S. Ct. 3405 (1984).

the illegal search and seizure is not committed at all. The police don't find the evidence. The defendant is not arrested. The crime, you will notice, still goes unpunished.

But the public doesn't *see* a visibly guilty suspect going free. *No one* sees the suspect; he hasn't even been arrested. The public is less upset with the fourth amendment, less upset with the courts—but only because it's fooled, only because it's deceived, only because the *visible* cost of letting the known defendant go has been transmuted into the *invisible* cost of not picking him up off the street in the first place.

The current Court is telling us that this deception is a benefit. And what does that in turn tell us about our conception of ourselves and of the Constitution? The real issue in the exclusionary rule cases is not the marginal balance of costs and benefits in terms of incremental deterrence. It is the virtue of fooling ourselves about the price we pay for having a Constitution that says that, in some circumstances, you're not supposed to engage in a particular search or seizure.

What the Court has done—when even most commentators on these decisions seem not to notice the trickery—is, in a subtle way, to redefine our conception of ourselves. The Court is telling us we're a society that wants to be fooled. We don't want to see the spectacle of the defendant going free.

So the real issue in cases like the exclusionary rule case is: What kind of society do we want to be? Do we want openly and visibly to pay the price for our fourth amendment—perhaps even to amend the Constitution to get rid of that amendment if we don't like the price we pay? Or do we want to push it under the rug? It is quite typical, I think, of the cost-benefit mode of analysis that these constitutive issues—What kind of society do we become when we declare what is a cost and what is a benefit?—are submerged.

It is typical of the cost-benefit perspective that the Court takes the step it chooses to take—whether in upholding the ban on travel to Cuba in *Regan v. Wald*,⁵⁵ or in chipping away at the core of the exclusionary rule in *United States v. Leon*,⁵⁶ or in placing religious symbols in official positions of authority in a case like *Lynch v. Donnelly*⁵⁷—without really asking what its steps are doing to our conception of who and what we are, how the Court's choices are reconstituting our polity. And then the Court blames whatever happens on someone else. That is, the Court will say in a case like *Leon*: Oh, it's the text of the fourth amendment that

55. 104 S. Ct. 3026 (1984).

56. 104 S. Ct. 3405 (1984).

57. 104 S. Ct. 1355 (1984).

we're neutrally enforcing. The fourth amendment says that people shall be secure against "unreasonable searches and seizures." It says nothing about the exclusion of evidence. Of course, that depends on what you think it means to be *secure* against unreasonable searches and seizures. The Court is making a choice but not acknowledging it.

Or take the legislative chaplain case.⁵⁸ The Court blames it all on history. It says that, back then, when they wrote these things, *they* had legislative chaplains. *They* didn't seem to mind. And so history has decided the matter for us.⁵⁹

Well, those who wrote the fourteenth amendment had segregated public schools, too; they didn't seem to mind. But we are not ruled from the grave by the unexpressed intentions of the Framers. We are ruled by a Constitution, and we must *choose* to give that Constitution content and accept responsibility for that choice. Cost-benefit analysis is a profoundly simple way of escaping responsibility. Others have struck the balance for us: the Framers, by the words they wrote or the intentions they held; history, by the practices it has condoned; Congress, by what it didn't quite say, but what we can say it said in a case like *Regan v. Wald*.⁶⁰

That leads to the sixth deadly sin committed by those who take this cost-benefit perspective: abdicating responsibility for choice. That, I think, is the great appeal of all fundamental faiths, including faith in technical expertise and in methods like cost-benefit analysis. They enable each of us to don a mantle that says, "I didn't do it." They create an illusion, a comforting illusion, of inexorability.

There are examples on both the right and the left in the Burger era. Let me begin with one that is a favorite decision of many liberals, *Roe v. Wade*,⁶¹ holding that legal obstacles to early abortion are unconstitutional. In its opinion, the Court stressed the role of medical expertise. Indeed, despite the desire of some to read the case as an affirmation of the rights of women, it is uncomfortable to note that the Court principally talks about the rights of doctors (and of the women that *doctors* serve) to decide, in their own professional judgment, when a pregnancy really ought to be terminated. Indeed, the Court's elaborately medical trimesterization of pregnancy in *Roe v. Wade* involves the same kind of abdication to expertise. The Court says that the state does not have a compelling interest in protecting the fetus until it is "viable," and it defines "viable" in medical terms—i.e., in terms of capacity to survive in an

58. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983); see *supra* text accompanying note 30.

59. 103 S. Ct. at 3332-36.

60. 104 S. Ct. 3026 (1984); see *supra* notes 36-45 & accompanying text.

61. 410 U.S. 113 (1973).

incubator outside the woman's uterus.⁶² Why precisely does the magic moment of compelling interest occur just at viability and not before or after? The Court offers only this "reason": Because, after viability, the fetus can survive in a hospital, outside the uterus.⁶³

That's a definition, not a reason. But it's easier to offer a definition; to point to the medical profession and its consensus; in effect, to blame "science" for a definition and a decision which, if defensible (and I believe it was, although it's hardly an easy one), was defensible only because it helped to empower women in society by putting them on a more equal footing with men. Men don't have to be involuntary incubators, even for their own children. If *Roe v. Wade* was right, *that's* why it was right—not because of what doctors think or what medical science describes.

There are prices we pay when we defend rights for the wrong reasons, by resting them on a quicksand of someone else's expertise. Quite predictably, Congress can come along and say, "We're just as smart as the doctors. In fact, we'll have a lot of doctors testify. Then we'll announce that we've learned a lot about the fetus. And we'll pass a Human Life Bill that undoes all the Court did—and without even a constitutional amendment." That has not yet succeeded. But, in a way, the Court has asked for it—by abdicating responsibility for choice.

Now take an example not from the left but from the right. Seven years after *Roe v. Wade*, in the case of *Harris v. McRae*,⁶⁴ the Court—having earlier decided that women have a right to terminate their pregnancies—held that it is permissible to withhold public funding from abortions for the poor, even when the same poor women would get even more public money for having children. *Why* is that permissible? How is it reconcilable with *Roe v. Wade*? Well, the Court's answer is simple: The government intervened in the decision of the pregnant woman to end her pregnancy in *Roe v. Wade*. But it wasn't the government that caused the woman's poverty in *Harris v. McRae*. Poverty, you see, is just a natural, background fact. Some people just *happen* to be poor.⁶⁵ But notice that it is the law—when it says that, if you don't have the money, abortion will not be available—that *transmutes* poverty into medical and social reality. It is the law, by establishing an elaborate system of privately

62. *Id.* at 163.

63. *Id.*

64. 448 U.S. 297 (1980).

65. *Id.* at 316 ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.").

financed and privately available medical care, that decides to put medicine on the auction block. That's a decision of the legal and political structure. Michael Walzer's seminal book, *Spheres of Justice*,⁶⁶ makes the argument that, when a society transmutes one good thing (namely, money) into virtually all good things—by preventing those without money from acquiring those things—we should not fool ourselves into thinking that it is *nature* that has decreed the outcome.⁶⁷ So too, by placing the right to end pregnancy on the wrong basis, on a basis of professional expertise plus personal privacy, the Court boxed itself into a corner, all but gutting the core meaning of the right originally proclaimed. The Supreme Court of California,⁶⁸ and several other state courts,⁶⁹ have resisted that path by finding in state constitutions a right to funding for abortion if funding is available for childbirth.

Abdicating responsibility for choice, then, is a characteristic sin of the current Court. And I think it is useful, at least for me in remembering my days with Mat Tobriner, to recall what, for him, was part of the antidote. It was, as many things were for Mat, deceptively simple. "Don't use the passive voice," he would say. David Balabanian, my friend and predecessor as one of Justice Tobriner's law clerks, has perceptively noted, in his memorial essay for the judge, how important that advice was:⁷⁰ Don't use the passive voice. It makes it look as though someone out there, unspecified, is doing it to us. Admit that it's *we* who are doing it.

There is a final irony and a final sin: that denying responsibility for choice makes it easier for judges to *seize* power as well as to share it with the executive branch. The seventh deadly sin, then: indulging judicial imperialism, masquerading as modesty or strict construction.

In case you hadn't noticed it, we now have a highly activist Supreme Court. In *Buckley v. Valeo*,⁷¹ for example, the Burger Court struck down Congress' one comprehensive attempt to regulate campaign finance by limiting how much those with money can dominate the political process. And *Immigration & Naturalization Service v. Chadha*,⁷² in one fell

66. M. WALZER, *SPHERES OF JUSTICE* (1983).

67. *Id.* at 97-122.

68. *See* Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 886 (1981) (Tobriner, J.).

69. *See, e.g.,* Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982); *cf.* Planned Parenthood Ass'n v. Department of Human Resources, 63 Or. App. 41, 663 P.2d 1247 (1983), *aff'd on other grounds*, 297 Or. 562, 687 P.2d 785 (1984) (decision affirmed on statutory grounds).

70. *See* Balabanian, *Justice Was More Than His Title*, 70 CALIF. L. REV. 878, 879 (1982).

71. 424 U.S. 1 (1976).

72. 103 S. Ct. 2764 (1983).

swoop, struck down more acts of Congress than all preceding Supreme Courts combined had done in all their days—and did so for rather wooden and formalistic reasons. *Regan v. Wald*,⁷³ too, was an activist decision insofar as it paid little real attention to the manifest intentions of Congress in cutting back executive power in 1977. Finally, in deciding *Roe v. Wade*,⁷⁴ the Court may have believed there would be less uproar because it could attribute to others the choice it had made.

Unhinged from the discipline of conceding that it is *making* constitutional choices, the Court readily seizes power and says that it is just carrying out one neutral method or another. And the underlying program of the method, when it is married to cost-benefit analysis, is more likely than not to be the aggrandizement of authority for those who already wield enormous power—whether in the medical profession, in the executive bureaucracy, or in the corporate world of wealth and privilege.⁷⁵

The ultimate point is fairly simple. It is that constitutional law is emptied of its critical force, its capacity to challenge existing patterns of authority and power, when it is filtered through a utilitarian screen that makes courts into mere cost-benefit calculators and interest-balancers.

So there we have it. Seven dangers of pseudo-science in constitutional law: devaluing process; ignoring the distribution of power and wealth; becoming fixated on the tangible; inviting the tyranny of small decisions; overlooking what ultimately matters most, the constitutive dimension of what we do; abdicating responsibility for choice; indulging in hidden judicial imperialism.

My position is not, surely, that courts, or anyone for that matter, should ignore consequences and make constitutional choices in a vacuum unhinged from reality. It is the Book of Luke that asks: “Which of you, intending to build a tower, sitteth not down first and counteth the cost?”⁷⁶ That’s fair enough.

But my message is that we’d better count with full recognition that the tower we are building is one that we will have to live in, and not just observe from afar. When it is, in John Marshall’s deathless phrase, “a *constitution* we are expounding,”⁷⁷ we had best remember that it is *ourselves* that we are constituting. To forget that is to forget, in the name of counting, all that really counts. To say that any one of our deepest con-

73. 104 S. Ct. 3026 (1984).

74. 410 U.S. 113 (1973).

75. See generally L. TRIBE, CONSTITUTIONAL CHOICES (1985).

76. Luke 14:28.

77. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

stitutional commitments—and I quote the Court—“cannot pay its way,”⁷⁸ as though our scale of costs and benefits were already out there, and not something that we are in the process of constructing, is to exalt the price of everything and the value of nothing.

* * * * *

How are we to react to the specter of a Supreme Court moving in this direction? Surely we could retreat to cynicism, accepting for the rest of our lives the inevitability of a moral vacuum, one pulling us all toward constituted authority even in our nation's court of last resort. Or we could believe that the Justices may not have fully appreciated what they are doing. They are not, after all, evil men and women. They may simply be captives of an ideology that we are capable of exposing, and thus of helping them—the Justices themselves—to defeat. We can, in other words, keep the faith, and keep arguing with passion for the constitutional choices in which we believe and of which we dare to think we can convince others. We can take either path.

I ask myself what Mat Tobriner, that gentle and wise man with a passion for justice, would do. Would he be cynical? Or would he keep trying? And then I know what I must do. I commend to you Robert Frost's teasing question in his poem, *The Black Cottage*:

[W]hy abandon a belief
Merely because it ceases to be true.
Cling to it long enough, and not a doubt
It will turn true again . . .⁷⁹

So let me end as I began—with a few words from Tennyson's *Ulysses*:

Come, my friends,
'Tis not too late to seek a newer world . . .
Though much is taken, much abides; and though
We are not now that strength which in old days
Moved earth and heaven, that which we are, we are,
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield.⁸⁰

78. *United States v. Leon*, 104 S. Ct. 3405, 3413 n.6 (1984) (White, J.) (finding that the exclusionary rule “can have no substantial deterrent effect in the sorts of situations under consideration in this case” and thus “cannot pay its way”).

79. R. FROST, *The Black Cottage*, in *THE POETRY OF ROBERT FROST* 58 (E. Lathem ed. 1969).

80. Tennyson, *supra* note 2, at 402-03.